

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
MISCELLANEOUS APPEAL/ APPLICATION NO. 40 of 2021
(Arising from Misc. Application No. 544 of 2021)
(All arising out of Misc. Cause No.138 of 2021)

CHINA RAILWAY NO.3 ENGINEERING CO. LTD:.....APPLICANT

VERSUS

MUWEMA AND CO.ADVOCATES & SOLICITORS:.....RESPONDENT

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

The applicant China Railway No.3 Engineering Co. Ltd filed this appeal under Section 33 of the Judicature Act Cap 13, Sec 98 of the Civil Procedure Act Cap 71, Order 50 Rule 8 and Order 52 Rule 1 and 3 of the Civil Procedure Rules SI 71-1 for the following orders;

- a. Ex-parte orders issued in Misc. Cause No.138 of 2021 by the Deputy Registrar, His Worship Jameson Karemani were issued erroneously, unfairly and or without a fair hearing and the same be set aside.
- b. Ex-parte orders issued in Misc. Application No.544 of 2021 by the Deputy Registrar, His Worship Jameson Karemani were issued erroneously, unfairly and or without a fair hearing and the same be set aside.
- c. The respondents be ordered to pay the costs of the application.

The grounds in support of this application were stated briefly in the Notice of Motion and in the affidavit in support of the application sworn by Wang Junbo, the Managing director of the applicant company, but briefly state;

1. The Learned Deputy Registrar erred in law and fact when he erroneously relied on a retainer agreement that did not relate to the subject matter in issue in Misc. Cause No.138 of 2021 thereby occasioning a miscarriage of justice.
2. The Learned Deputy Registrar erred in law and fact, when he erroneously determined Misc. application no. 138 of 2021, before disposing of the interlocutory matter vide Misc. application no. 544 of 2021 on merit thereby occasioning a miscarriage of justice.
3. The Learned Deputy Registrar erred in law and fact by not determining misc. application no. 544 of 2021 on merit and did not accord the appellant fair hearing thereby occasioning a miscarriage of justice.
4. It is fair and equitable that this application and/or appeal be allowed and all the orders issued by the Deputy Registrar in Misc. Cause no.138 of 2021 and Misc. application No.544 of 2021 be set aside and the matters be heard de novo on merit before another Registrar of this Court.

The respondent filed an affidavit in reply opposing the application. It was sworn by Kagoro Friday Roberts, an Advocate with the respondent law firm, contending that;

1. That on 3rd May 2021, the respondent law firm filed an application for leave to tax the respondent's advocate-client bill of costs presented before court slated for 15th June 2021 and service of the same was effected on to the

applicant's lawyers of KWB Advocates on 17th May 2021 and an affidavit of service was filed on 8th June, 2021.

2. That despite the applicant's knowledge of the respondent's application and hearing date, the applicant adamantly refused to file a reply or appear in court in person or by a representative on the day of the hearing.
3. That on 31st August 2021, the applicant decided to file their affidavit in reply in Misc. Cause No. 138 of 2021 out of time followed by Misc. application No.544 of 2021.
4. That Misc. Cause No. 138 of 2021 had been referred to the judge, since the respondent's claim was substantial, in fear of Court orders in the application being rendered nugatory if the applicant left the jurisdiction, the applicant being a foreign incorporated company doing business in Uganda with no asset within Uganda, the respondent requested that the matter be expeditiously fixed before any available judge for prompt disposal.
5. That the Court issued directives for the parties to file their submissions by 27th August, 2021 and the ruling was to be delivered on 10th September 2021. The directives were served to the Applicant's lawyers in a letter dated 28th July,2021 but were still deliberately disobeyed by the applicant though the respondents filed theirs on 23rd August 2021 and a ruling was delivered based on the same.
6. That the hearings of both Misc. application No. 544 of 2021 and Misc. Cause No. 138 of 2021 were fixed for hearing on 21st October, 2021. That service of the same was effected on the applicant and the affidavit of

service filed on record but still the applicant failed to appear in court to lay their claims.

7. That the applicant has not shown sufficient cause why court should admit their appeal/application to set aside Ex-parte orders issued in Misc. Cause No.138 of 2021 and Misc. application No.544 of 2021.

Counsel Hannington Mutebi appeared for the applicant while Counsel Mulema Mukasa appeared for the respondent.

In his submissions, counsel for the respondent raised a preliminary objection that the appeal was bad in law due to the fact that the applicant was seeking to set aside two separate court decisions in two distinct applications that is ***Misc. Cause No.138 of 2021 and Misc. application No.544 of 2021*** by filing one appeal.

He referred court to **Order 50 Rule 8 of the Civil Procedure Rules (CPR)** that provides for appeals against orders of the Registrar to the High Court. Counsel relied on the case ***of Kimala Tonny and Anor -v- Grace Perpetua Otim High Court Civil Appeal No.32 of 2019 citing with approval the cases of (Hamam Singh Bhogal T/A Hamam Singh & Co –v- Jadva Karsan (1953) 20 EACA 17/Baku Raphael -v- Attorney General S.C Civil Appeal No.1 of 2005 and Attorney General -v- Shah (NO.4) [1971] EA 50)***, the Court observed that;

“the right of appeal is a creature of statute and must be given expressly by statute. Except as otherwise expressly provided, no appeal lies from any order made by a Court in the exercise of its original or appellate jurisdiction (see section 76 (1) and 77 (1) of the Civil Procedure Act). Save interlocutory decisions

specific under Order 44 of the Civil Procedure Rules and from no other orders, there is no right of appeal to this Court originating from interlocutory orders.”

Counsel argued that Misc. application no. 544 of 2021 was not one of those provided for under Order 44 of the CPR. That the application was dismissed under Order 9 Rule 22, so the applicant’s remedy was an application to set aside under Order 9 Rule 22.

Furthermore, that Misc. Cause No. 138 of 2021 was heard ex-parte under Order 9 Rule 20 therefore, the applicant ought to have proceeded under Order 9 Rule 27, to set aside the orders in issue on ground that the summons were not duly served or that there was a sufficient cause that prevented the non-attendance.

Counsel submitted that these two matters were distinctively filed with Misc. application arising from the Misc. Cause despite the fact that they were heard on the same day. That Misc. application was the first to be heard and dismissed while the cause was then heard ex-parte and judgment delivered on 22nd November 2021. Counsel concluded that it was therefore irregular and wrong for the applicant to file one appeal for two different files.

In response, counsel for the applicant submitted that the crux of this appeal arises from the disposal of Misc. Cause No. 138 of 2021 and the interlocutory application Misc. application no. 544 of 2021. That it was upon the disposal of Misc. Cause No. 138 of 2021 which was the main suit that the appellant lodged an appeal against the orders issued therein and incidental to those issued in the interlocutory application.

Counsel further submitted that there was never an ex-parte judgment as alleged but rather the Registrar made a ruling disposing of the main matter and consequently there could not be separate appeals where there was no pending suit. It was counsel's submission that Order 44, Order 9 rule 22 and 23 of the Civil Procedure Rules SI 71-1 were quoted out of context since they were not applicable where the main suit was disposed of and an appeal was lodged against orders issued therein including the interlocutory application.

Counsel argued that where a party had appealed against the main suit it followed then that a party could not apply under Order 9 rules 22 and 23 which were only applicable if the main suit was still pending a final decision. That it was therefore an inconceivable and legally misconceived argument that the applicant/appellant ought to have applied under Order 9 rules 23 and 27.

Counsel reiterated that this appeal was commenced under Order 50 Rule 8 of the Civil Procedure Rules which allows a person aggrieved by the decision of a registrar to appeal to the High Court and it was in respect of Misc. Cause No.138 of 2021 and the interlocutory application thereto.

Analysis

Order 50 Rule 8 of the Civil Procedure Rules under which this appeal was filed provides that; **“Any person aggrieved by any orders of a registrar may appeal from the other to the High Court. The appeal shall be by motion on notice”**.

As argued by counsel for the applicant/appellant, this appeal/application emanates from Misc. Cause No.138 of 2021 and the interlocutory application thereto Misc. application no. 544 of 2021. Misc. application no. 544 of 2021 was

filed by the applicants seeking for orders that Eng. Mbazzi M Joseph and Eng Wanda Martin be joined as respondents to Misc. Cause No.138 of 2021 and all applications arising therefrom as well as costs in the cause for the application. The application was called on 21st October 2021 but the applicant was absent and the matter was dismissed for non-appearance.

On the other hand, Misc. Cause No.138 of 2021 was filed by the respondent law firm seeking for orders that leave be granted to tax their costs presented before the court against the applicant company. The matter was called on the 21st October 2021 and in the absence of both parties but with the applicant's (therein) lawyer present was set down for ruling. The applicants (herein) had filed an affidavit in reply but not final submissions. The Registrar granted the orders sought.

The applicant herein was aggrieved by the orders granted by the registrar in both matters hence this appeal. I concur with counsel for the applicant that where there was a final decision in the main suit, it would be inconceivable to apply under Order 9 rules 22 and 23 which were only applicable if the main suit was still pending a final decision. The right avenue, in this case, was, therefore, Order 50 rule 8 which allowed the applicant to appeal against the orders of the registrar.

I also further agree with the applicant's submission that there was no ex-parte judgment in Misc. Cause No.138 of 2021. The applicant (then respondent) filed an affidavit in reply to the application but did not file submissions in reply as directed by the Registrar who then proceeded to set down the matter for ruling. An ex-parte judgment is made where the court has only heard from one side which was not the case here. There is an affidavit in reply on the record of the court.

The respondent's preliminary objections lack merit and are therefore dismissed.

I shall now proceed to determine the merits of the matter.

Ground 2: The learned Deputy Registrar erred in law and fact when he erroneously determined Misc. Cause No.138 of 2021 before disposing of the interlocutory matter vide Misc. application No. 544 of 2021 on merit thereby occasioning a miscarriage of justice; and

Ground 3: The learned trial Registrar erred in law and fact by not determining Misc. application No. 544 of 2021 on merits and did not accord the appellant fair hearing thereby occasioning a miscarriage of justice:

Counsel submitted that the matters in issue were not determined on merit since the applicant was under the mistaken belief that the matter was before this court and was therefore waiting for directives from this court and not the registrar. That there was no formal communication made to the applicant or her lawyers upon returning the files to the registrar.

That annexure "D" to the affidavit in reply is a memo from the Judge as relied upon by the respondent is the crux of the of the applicant's grievance as the same was never communicated to the applicant. Counsel prayed that the orders in issue be set aside and the matter be heard on merit.

In reply, the respondent's Counsel contended that both matters in issue were fixed for hearing of 21st October 2021 and service effected on the applicant on 19th October 2021 but neglected to appear.

That on that day, Misc. application No. 544 of 2021 was called first and dismissed. Then the Misc. cause proceeded ex-parte and the ruling delivered later on.

I have taken into consideration the pleadings and submissions in this appeal.

Misc. Cause No. 138 of 2021, was filed on 3rd May 2021 and served on the respondent on 17th May, 2021. On 4th August 2021, the respondent filed an affidavit in reply together with a letter explaining the delay in filing a reply and among them was the lockdown that was lifted on 30th July 2021. On that same day, the respondent filed Misc. App. No. 544 of 2021 for addition of parties to the main cause and requested for its hearing before the main cause. The same was noted by the Deputy Registrar but no directives were given.

On 13th October, the applicant was served with a hearing notice for MC No. 138 of 2021 and as per the affidavit of service by Balyesiga Charles dated 20th October. I have looked at the same and not that it was received in protest pending disposal of the MA No. 544 of 2021. On 21st October 2021, the registrar heard the matter in absence of the respondent and the ruling was later delivered in favor of the respondent.

MA. No. 544 of 2021 was also dismissed on that same day. A closer look at the hearing notices shows that the hearing of both matters was fixed for 21st October, 2021 at 2:30. I do also note that both hearing notices were served on the applicant on 19th October 2021 at 8:44 and were received by counsel Hannington though the one for Misc. Cause No. 138 of 2021 was received under protest pending the disposal of the Misc. Application.

It is from the above record that the court concludes that the applicant was served with hearing notices for both matters before the registrar on the 21st of October 2021 at 2.30 hence given a chance to be heard but failed to enter an appearance.

There is also no evidence to verify which application was called first before the registrar since both were fixed for hearing at the same time. It is therefore probable as argued by counsel for the applicant that Misc. Cause No. 138 of 2021 was disposed of before Misc. application No. 544 of 2021.

Additionally, given the stake in terms of the amounts of 6,000,000,000/=--six billion Uganda shillings sought in this matter, it is only fair and just to allow the orders sought by the applicant in this matter. It is also important to note that there is a major contention on the key piece of evidence which is the retainer agreement relied on by the registrar in his ruling of Misc. Cause No. 138 of 2021 that needs to be settled once and for all. The court has a duty to dispense justice and it would be an injustice if the applicant is not given a chance to fully defend Misc. Cause No. 138 of 2021. While rules of court and procedure are made to be obeyed, where strict observance may lead to injustice on any of the parties, the court should be liberal in the interpreting the rules in order to do substantial justice.

I, therefore, invoke the inherent powers of this court under Section 98 of the Civil Procedure Act to set aside the orders in issue and direct that the matter be heard interparty.

I did not consider ground one because it delves into the merits of Misc. Cause No. 138 of 2021.

In the circumstances, therefore;

1. Ex-parte orders issued in Misc. Cause No.138 of 2021 by the Deputy Registrar are hereby set aside.
2. Ex-parte orders issued in Misc. Application No. 544 of 2021 by the Deputy Registrar are set aside.
3. Both Misc. Cause No.138 of 2021 and Misc. Application no.544 2021 shall be heard on merit before the Assistant Registrar.
4. Costs in the cause

I so order.

SSEKAANA MUSA

JUDGE

30th November 2022